

signed an “*Interim*” OVS agreement with the City of Boston.²⁸ It has a one year term.²⁹ The document states that it is intended only as an interim agreement and then indicates that the parties are working toward executing a cable television franchise.³⁰ The term can be automatically extended for two additional six month terms or terminated earlier if a cable franchise has been granted.³¹ In reaching this short term agreement with the City of Boston, RCN-BETG has frustrated the efforts of every video programming provider who would otherwise seek to provide programming over the RCN-BETG system. Clearly, under these circumstances, no prospective video programmer that hopes to compete using the RCN-BETG platform is likely to request channel capacity when the OVS system will likely cease to exist within 12 to 24 months, or even sooner. If, on the other hand, RCN-BETG offers a genuine platform on a long-term basis and allows unaffiliated video programmers to participate on fair, reasonable, and nondiscriminatory terms, Joint Petitioners would be prepared immediately to participate.

In signing such a short term agreement, RCN-BETG has unlawfully discriminated in favor of RCN-BETG’s programming affiliate by providing it the assurance that its own video programming operations will continue indefinitely as a franchised cable television system while unaffiliated providers will only have access to the system for a very short period. Neither Congress nor the FCC intended OVS to be a mere placeholder while the operator seeks a cable

²⁸ Interim Open Video Systems Agreement Between the City of Boston, Massachusetts and RCN-BETG, LLC, June 2, 1997 (“Interim Agreement”) attached hereto as Exhibit 6.

²⁹ Interim Agreement, Section 1.3.

³⁰ See Interim Agreement at 2. “WHEREAS, RCN-BETG and the City have agreed to initiate negotiations for a cable television license. . . .” See also Interim Agreement, Section 1.4.

³¹ Interim Agreement, Section 1.3.

television franchise.³² To do so would undermine the goals of providing competition and would provide an inequitable advantage to OVS providers vis a vis other types of service providers who enter the marketplace by obtaining a cable television franchise.

Similarly, RCN-BETG has flaunted FCC rules in impermissibly truncating the enrollment period for video program providers to request carriage on its OVS system. The FCC has clearly stated that “[v]ideo programming providers must receive adequate notice and opportunity to participate in the allocation of system channel capacity. An enrollment period therefore may not expire fewer than 90 days after the Commission’s release of the Public Notice of the Notice of Intent.”³³ RCN-BETG filed its Notice of Intent with the FCC on February 28, 1997 (the “NOI”). In the NOI, RCN-BETG initially stated that the enrollment period for video programmers would commence February 28, 1997 and conclude May 31, 1997.³⁴ However, RCN-BETG also states that “[i]n order to allow for contract finalization, ensure orderly channel allocation and allow timely systems allocation to occur, [video programming providers] must submit their preliminary enrollment requests no later than April 30, 1997.”³⁵

³² See, e.g., 47 C.F.R. § 76.1503(c).(2)(ii) (requiring OVS operators to reallocate available capacity at least once every three years).

³³ Second Report and Order at ¶ 49.

³⁴ Notice of Intent to Establish an Open Video System, filed Feb. 28, 1997 by RCN-BETG, LLC (“NOI”) at 4.

³⁵ NOI at 4. Despite RCN-BETG’s recitation that its enrollment period would be from February 28, 1997 through May 31, 1997 which *appears* to meet the FCC requirement that the enrollment period not expire in fewer than 90 days, in fact, programmers were required to have their programming requests to RCN-BETG within 60 days of the filing of the NOI. Not only does RCN-BETG’s requirement that requests be filed by April 30, 1997 truncate by one third the enrollment period required by the FCC, but it also impermissibly calculates the opening of the enrollment period from the day of the filing of its NOI, not the day on which the FCC releases its

C. RCN-BETG's Refusal to Provide Joint Petitioners with Any Information With Regard to Its OVS Offerings Violates FCC Rules, and Raises Serious Questions About RCN-BETG's OVS Plans

By letter dated April 29, 1997, the Joint Petitioners expressed an interest in providing programming on RCN-BETG's OVS system and requested information about its offerings. The Joint Petitioners also asked that RCN-BETG treat the April 29 letter as a preliminary enrollment request in accordance with procedures set forth by RCN-BETG. RCN-BETG categorically refused to provide any information about its OVS plans to the Joint Petitioners, in blatant violation of FCC rules. RCN-BETG's sole rationale for its conduct, as reiterated in its Opposition, was that the Joint Petitioners asked for information which is highly confidential and proprietary. This rationale borders on the absurd. The Joint Petitioners' request for information precisely tracked the information which an OVS operator is required to disclose under the Commission's rules. By claiming that it is entitled to withhold the very information required to be disclosed, RCN-BETG is again thumbing its nose at the Commission's OVS regime.

That RCN-BETG is obligated to disclose the information requested by the Joint Petitioners is clear from even a cursory comparison of the Joint Petitioners' request with the requirements of § 76.1503(b)(2) of the Commission's rules. Thus, the Joint Petitioners' April 29 letter requested information as to "projected activation date of the system," and "the deployment schedule for your system, including the estimated date on which you expect to enter and complete each community and anticipated number of homes passed (on a monthly basis)." Section 76.1503(b)(2)(i) of the rules requires that open video system operators provide video programming providers with information as to "the projected activation date of the open video

Public Notice. On both accounts, this calculation is plainly contrary to the requirements of the FCC.

system. If the system is to be activated in stages, the operator should describe the respective stages and the projected dates on which each stage will be activated.”³⁶ Similarly, the Joint Petitioners’ April 29 letter requested information as to “the estimated rates that Cablevision would be charged per analog channel.” The Commission’s rules again provide that an OVS operator must disclose a “preliminary carriage rate estimate.”³⁷ The Joint Petitioners’ April 29 letter requested that RCN-BETG describe “all technical information, including a description of customer premises equipment; a description of all transmission reception equipment, including any proprietary network software that will be necessary for Cablevision to interface with your open video system; and a list of equipment that RCN-BETG will make available to facilitate the carriage of unaffiliated video programming” Again, the Commission’s rules require that OVS operators disclose “technical information that is reasonably necessary for potential video programming providers to assess whether to seek capacity in the open video system, including what type of customer premises equipment subscribers will need to receive service”³⁸

Neither RCN-BETG’s response to the April 29 letter, nor its Opposition, even acknowledge its clear legal obligations under FCC rules, much less explain its blatant refusal to adhere to them. Rather, RCN-BETG appears to be suggesting that OVS operators have a right to withhold information, the disclosure of which is required under Commission rules, when it determines in its discretion that such information is proprietary or confidential. Of course, there is absolutely no legal support for this position. In fact, by requiring the disclosure of this

³⁶ 47 C.F.R. § 76.1503(b)(2)(i).

³⁷ 47 C.F.R. § 76.1503(b)(2)(ii).

³⁸ 47 C.F.R. § 76.1503(b)(2)(iv).

information, the Commission has already determined that disclosure of this type of information is essential to facilitate compliance with its OVS regime.

In light of RCN-BETG's regulatory gamesmanship with local franchising authorities, as described above, it is far more likely that RCN-BETG has refused to disclose this information because there is no information to disclose. Simply put, RCN-BETG's attempt to hide the ball is further evidence that RCN-BETG has no intention whatsoever of offering OVS service. RCN-BETG should be instructed in no uncertain terms that it must either comply with the Commission's information disclosure rules, or face decertification as an OVS provider.

II. ALLOWING JOINT PETITIONERS TO PARTICIPATE AS A VIDEO PROGRAMMING PROVIDER ON RCN-BETG'S OPEN VIDEO SYSTEM IS IN THE PUBLIC INTEREST

Joint Petitioners filed their Petition with the FCC based on their understanding that RCN-BETG intended to provide a platform consistent with the FCC's rules and regulations. To the extent RCN-BETG's OVS system is more than regulatory vaporware, Joint Petitioners are interested in exploring further the possibility of being a video programming provider on that platform. Currently RCN-BETG has no independent programming on its OVS platform. Joint Petitioners are likely to be the only independent programmers. Their presence will in no way undermine either facilities-based competition or inter-programmer competition -- a key aspect of OVS. In fact, their presence on the system will allow RCN-BETG's OVS system to function as Congress and the FCC intended by including programming of an independent programmer. Without independent programmers, OVS systems would be nothing more than cable systems with reduced regulatory requirements, a clearly anticompetitive result.

As set forth in its Petition, Joint Petitioners' participation on the RCN-BETG OVS system would provide subscribers to the OVS system with a range of specialized programming services,

including special business programming, culturally diverse programming, educational channels, new local programming, special programming packages, pay-per-view entertainment programming designed specifically for hotels, services for the college population, and other niche programming.³⁹ Denying Joint Petitioners -- the only unaffiliated video programmers who continue to express interest in the so-called Open Video Systems of RCN-BETG -- the opportunity to provide their unique programming to Massachusetts consumers would further deprive them of the benefits of genuine competitive diversity and would allow RCN to continue operating as a cable operator without abiding by the applicable regulatory framework.

As a basis for its opposition, RCN-BETG merely asserts, but does not explain, how the Joint Petitioners' participation as a video programming provider will impede competition. RCN-BETG's repetitive discussion of "facilities-based competition" does not constitute an explanation. Put simply, if RCN-BETG has capacity available on its OVS systems, and the Joint Petitioners are willing to pay for the carriage of their programming services, facilities-based competition will be advanced. Presumably, RCN-BETG is capable of pricing these carriage services at a profit, which should increase, not decrease, RCN-BETG's incentives to invest in video programming delivery facilities.

In fact, RCN-BETG's entire competitive argument is clearly premised on the idea that the Joint Petitioners' programming would displace programming of some as yet unnamed alternative video programming producer.⁴⁰ Similarly, in adopting the provisions of its rules authorizing OVS providers to deny carriage to cable operators, the Commission expressed similar concerns, noting

³⁹ Petition at 4.

that incumbent cable operators should not be permitted "to occupy capacity on a competitor's system that could be used by another video programming provider."^{41/}

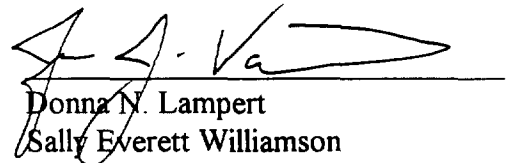
No such concerns are present here. RCN-BETG received "several inquiries", but no requests for service by independent video programming providers during its enrollment period.⁴² Thus, the Joint Petitioners' use of capacity in its OVS service will only add to the services available to the public, as set forth in the original Petition.

CONCLUSION

For the foregoing reasons, the Joint Petitioners' Petition for Expedited Determination should be granted.

Respectfully submitted

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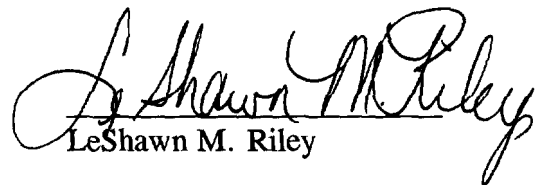
⁴⁰ See, e.g., Opposition at 6 ("Cablevision's motives thus run directly counter to the Commission's desire that cable operators upgrade their facilities and not occupy space on open video systems that should be devoted to VPPs without cable networks of their own.").

⁴¹ Second Report and Order at ¶ 52.

⁴² See "RCN-BETG Joint Venture, City of Boston Ink 'OVS Agreement,'" Telecommunications Reports, June 9, 1997 at 14 attached hereto as Exhibit 7.

CERTIFICATE OF SERVICE

I, LeShawn M. Riley, hereby certify that on this 23rd day of July, 1997, I caused copies of the foregoing "Comments of Cablevision Systems Corporation" to be delivered by messenger to the following:


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